Supreme Court, U.S.
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No.

In The

SUPREME COURT

of the

UNITED STATES
October Term, 1997

FEDERATION OF CONNECTICUT TAXPAYER ORGANIZATIONS, ET AL.,

Petitioners

versus

CHRISTOPHER BURNHAM, ET AL.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

The following questions are presented for review:

1. Did the courts below err in rejecting the state taxpayers' claim of federal court subject matter jurisdiction in this good faith pocketbook action under either the Due Process Clause of the Fifth and Fourteenth Amendments to the Constitution of the United States or the Federal Common Law?

2. Did the courts below err in deciding that prospective injunctive relief against state officials alleged to be exercising their tax and spend authority in excess of a specific state law limitation would violate the holding of this Honorable Court in *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984)?

3. Did the courts below err in continuing to abstain under the holding of this Honorable Court in *Railroad Commission v. Pullman Company*, 312 U.S. 496 (1941) even after the Connecticut Supreme Court had ruled that the state courts had no subject matter jurisdiction over this case and controversy due to the state constitution's separation of powers provision?

PARTIES TO THE PROCEEDING

FEDERATION OF CONNECTICUT TAXPAYER ORGANIZATIONS, WEST HARTFORD TAXPAYERS' ASSOCIATION, INC., WETHERSFIELD TAXPAYERS' ASSOCIATION, INC., S.T.O.P. (Stop Taxpayers Overpaying), VERNON TAXPAYERS' ASSOCIATION, P.A.C.T. (POMFRET ASSOCIATION OF CONCERNED TAXPAYERS), TAXPAYER ADVOCATES FOR BLOOMFIELD, WINDHAM-WILLIMANTIC TAXPAYERS' ASSOCIATION, ALLEN HOFFMAN AND FRED STANDT, individually and on behalf of all other Connecticut Taxpayers similarly situated,

Petitioners

versus

CHRISTOPHER BURNHAM, Treasurer of the State of Connecticut, NANCY WYMAN, Comptroller of the State of Connecticut, REGINALD JONES, Secretary, Office of Policy and Management, RALPH J. CARUSO, Director, Office of Fiscal Analysis,

Respondents.

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v.

CHRISTOPHER BURNHAM, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioners respectfully pray that a Writ of Certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Second Circuit entered in this matter on November 17, 1997. A Petition for Rehearing was denied on January 28, 1998. This petition is filed within ninety (90) days of the denial of the Petition for Rehearing.

OPINIONS BELOW

The Recommended Ruling and Judgment entered thereon by the United States District Court for the District of Connecticut at New Haven, entered on June 28, 1996 and March 25, 1997, respectively, and the Summary Order of the United States Court of Appeals for the Second Circuit, entered on November 17, 1997 and the denial of the Petition for Rehearing entered on January 28, 1998, are reprinted in the Appendix at pages A - 2 to A - 23. The Opinions of the District Court and the Court of Appeals for the Second Circuit are unreported.

Jurisdiction

The Summary Order of the United States Court of Appeals for the Second Circuit was entered on November 17, 1997 and a Petition for Rehearing was denied on January 28, 1998. This Petition for Certiorari was filed within 90 days of the denial of the Petition for Rehearing. The Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1254 (1).

Constitutional and Statutory Provisions Involved

Article III, Section 2 and the Fifth and Fourteenth Amendments to the Constitution of the United States as well as Article III, Sec. 18 (a), (b) & (c) of the Connecticut Constitution are set out in the Appendix to this Petition.

STATEMENT OF THE CASE

The relevant facts can be found in the Recommended Ruling (hereinafter RR) of Magistrate Judge Joan Glazer Margolis which was approved and adopted by District Court Judge Janet Bond Arterton. In Section I. Factual and Procedural Background, set forth in the Appendix at A - 4 to A - 11, the court found that, "On November 3, 1992, the Connecticut voters approved an amendment to the Connecticut Constitution which limited the extent to which the Connecticut General Assembly could increase the State's general budget expenditures, by creating spending caps and eventually a balanced budget. These amendments became Connecticut Constitution, Article III, Sections 18 (a), (b), and (c)." RR at A - 4. "Plaintiffs (hereinafter the Taxpayers) allege violations of their due process rights under the Fifth and Fourteenth Amendments, and seek injunctive relief with respect to disbursements of state taxpayer revenues in excess of these Connecticut Constitutional provisions." RR at A - 11.

In its Amended Complaint, the Taxpayers alleged that under Connecticut's Biennial Budget for Fiscal Years 1995 – 97, general budget expenditures exceeded the spending cap by $ 421.1 million in FY 1995 – 96 and $ 318.9 million in FY 1996 – 97.

The Second Circuit also stated that:

> Plaintiffs contend that their member taxpayers have a property interest in tax

> revenues they contribute; that the four defendant officials are trustees of these revenues; and that by making appropriations in accordance with the General Assembly's unconstitutional budgets, the defendants are depriving the taxpayers of their property interest without due process of law. Suit was brought against the four state officials who administer the tax revenues in order to prevent wrongful distribution of the funds. Summary Order at A – 19

The failure of the General Assembly to comply with the spending caps spawned two actions filed by separate taxpayer groups. "On or about September 28, 1993, an action was commenced in the state Superior Court, Nielsen v. State of Connecticut, in which plaintiffs sought essentially the same relief as (the relief sought by the Taxpayers) in the ...federal actions." RR at A - 8. Shortly thereafter, "On October 14, 1993, (the Taxpayers) commenced Federation of Connecticut Taxpayer Organizations v. Suggs, 3:93 CV 2062 (AHN), which alleged violations of these constitutional provisions with respect to the 1992 - 93 and 1993 – 94 fiscal year budgets." *Id.* at A - 4. The reason that the Taxpayers chose to file their action in federal court three weeks after the state court action was commenced was the Connecticut Constitution's strict separation of powers provision. The Taxpayers believed that due to separation of powers, the state court would not have jurisdiction to provide the injunctive relief necessary since the relief would have to be directed against two

co-ordinate branches of the state government. In the end, the Taxpayers would be proved correct in their analysis but not before their first two attempts to obtain federal court intervention were dismissed.

As the Taxpayers prepared to file their first action, they discovered that although this Court has granted no fewer than seven petitions for certiorari in state taxpayer cases, this Court has never discussed a clear rationale for either jurisdiction or standing in those cases. After searching the decisions of this Court and the circuit courts, the Taxpayers offered a jurisdictional rationale based upon the Due Process Clause contained in the Fifth and Fourteenth Amendments to the Constitution. This rationale formed the basis for the complaints in both Federation I and II. The courts below dismissed both suits based upon jurisdictional concerns, the 11th Amendment and *Pullman* abstention. See *Railroad Commission v. Pullman Company*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941).

Federation I was referred to Magistrate Judge Margolis for disposition. "On November 30, 1993, this Magistrate Judge filed a four-page "Recommended Ruling on Pending Dispositive Motions" which dismissed plaintiffs' action, in that Sec. 1983 does not apply to claims made under the Connecticut Constitution. This recommended ruling was approved by Judge Nevas, over plaintiffs' objection, on December 22, 1993." RR at A - 4. In its rulings in Federation I, II and III, the district court made it clear that the dual nexus requirement made

applicable to federal taxpayers under this Court's decision in *Flast v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968) has been extended to state taxpayers. The district court refused to exercise jurisdiction over a claim based solely on a violation of *state* law, in this case a *state* constitutional limitation on the exercise of the *State* Officials' tax and spend authority.

The Taxpayers appealed the decision in Federation I and the Second Circuit affirmed although on slightly different grounds. Since the district court had dismissed on jurisdictional grounds, the issue of abstention was not discussed in the district court opinion. During oral argument, the Second Circuit raised *sua sponte* the issue of abstention under the *Pullman* doctrine. The decision is summarized in the RR at A - 5 & 6.

Because the pleadings were correctable and because the Taxpayers wanted to brief and argue abstention as a core issue, "On April 25, 1994, plaintiffs refiled their action in federal court, which again was assigned to Judge Nevas." RR at A - 6. Why refile? In the instant action, the Taxpayers filed an affidavit in support of their Motion for Summary Judgment. In their affidavit, the Taxpayers detailed how under the Biennial Budgets for FY 1993 – 95 and 1995 – 97, the State Officials had disbursed $ 1.5 *Billion* in excess of the spending cap. With $ 1.5 *Billion* at risk, the Taxpayers elected to try again.

In Federation II, the district court again dismissed the complaint for the same reasons as set forth in Federation I and also on the basis of *Pullman* abstention. The Taxpayers appealed and again the Second Circuit affirmed. This time, however, the Second Circuit relied exclusively on *Pullman*. A full description of that opinion is set forth in the RR at A – 7 & 6. The Taxpayers filed a Petition for Certiorari, Docket No. 95 – 540, that was denied by this Court.

After failing to successfully invoke the jurisdiction of the federal courts, the Taxpayers turned their attention to the *Nielsen* appeal. As the RR states, "Superior Court Judge Thomas Corradino dismissed the (*Nielsen*) lawsuit as nonjusticiable, the plaintiffs here (the Taxpayers) joined in the appeal as *amicus curiae*." (emphasis added) RR at A - 8. Since Federation I and II had been dismissed in part on the basis of *Pullman* abstention, the Taxpayers wanted to make a record that the state law issues had been properly presented to the state court for determination and to thereby obtain a determination on the state court's jurisdiction or lack thereof. This they did through the *Nielsen* appeal acting as *amicus curiae*. In their *Amicus* Brief, the Taxpayers presented the case they had sought to develop in the federal forum.

On February 6, 1996, the *Nielsen* Court issued its decision in which it stated that, "The plaintiffs have raised a claim that inextricable presents a political question not amenable to judicial resolution and that seeks relief that a court cannot provide without an impermissible intrusion upon the

prerogatives and functions of the coordinate branches of government. For both these reasons, we conclude that the case is nonjusticiable." (emphasis added) RR at A – 8 & 9. The Taxpayers had been correct. Due to separation of powers, the state court was without jurisdiction. Seventeen days after the *Nielsen* case was decided, this action, Federation III, was filed.

In the instant action, the Taxpayers carried forward the pleadings in Federation II and expanded their jurisdictional claim to include both the Due Process Clause and Federal Common Law. The Taxpayers further argued that in light of the *Nielsen* decision, *Pullman* abstention was no longer an option because there was no other forum in which the Taxpayers could present their grievance. Finally, the Taxpayers argued that the prospective relief requested would not contravene the 11th Amendment.

The State Officials continued their challenge to jurisdiction and again argued that both the 11th Amendment and *Pullman* abstention weighed heavily against the exercise of jurisdiction. In addition, the State Officials argued that *Nielsen* had actually decided the case. In response to this claim, the Taxpayers pointed out that under both state and federal law, a decision of a court which lacks subject matter jurisdiction is not on the merits and has no issue preclusive effect.

Once again the district court dismissed. It held that the "plaintiffs' theory of liability (now based on both the Due Process Clause and Federal Common

Law) is untenable." RR at A - 12. The court then continued, "Moreover, it is well-established that the Eleventh Amendment bars all suits against state officials in federal court, irrespective of the relief sought, if the claims are based upon alleged violations of state, not federal, law. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121 (1984)." (emphasis in original) RR at A - 12. Finally, with regard to *Pullman* abstention, the district court held, "Even assuming *arguendo* that a federal constitutional issue is presented...the Second Circuit strongly suggested that *Pullman* abstention is appropriate, even after an adjudication by a state court." (emphasis added) RR at A - 12. The district court did not, however, give *Nielsen* issue preclusive effect as requested by the State Officials.

On appeal, the Second Circuit affirmed the dismissal. Once again the court stated that, "We have stated previously that plaintiffs' theory of liability is untenable." Summary Order at A – 19 & 20. The court, after a discussion of the possible preclusive effect of *Nielsen,* then states, "Even if it is true that dismissal for lack of subject matter jurisdiction (in *Nielsen*) on one claim precludes any *res judicata* effect, plaintiffs would then face a compelling argument for abstention under the *Pullman* doctrine." RR at A - 21. A Petition for Rehearing was denied.

REASONS FOR GRANTING THE WRIT

1. The Decisions Below Present Issues of Imperative Public Importance That Merit This Court's Consideration.

As legal writers have stated, "Judicial attempts to provide theories in support of taxpayers' actions merely conceal the true basis for taxpayer standing. The fundamental reason for such actions is that court challenges to broad areas of governmental activity would be completely foreclosed if taxpayers' suits were not recognized." (citations omitted) Comment, *Taxpayers' Suits: Standing Barriers and Pecuniary Restraints*, 59 Temple Law Quarterly 951, 955 n. 30 and accompanying text (1986); Comment, *Taxpayers' Suits: A Survey and Summary*, 69 Yale L.J. 895, 904 (1960). Taxpayer actions fulfill a need for public oversight of the use, and sometimes abuse, of the public funds entrusted by the taxpayers of the community to public officials for public use.

Municipal taxpayer actions began to appear in the state courts in the late 1850's. In those days, the tax and spend authority to which the people were most often exposed was the municipality. The federal government, far away and concerned primarily with national affairs, and the state government, still in rudimentary development and concerned primarily with territorial affairs, did not have the day to day impact upon the lives and conditions of the citizens that the municipalities had. It was the municipalities that built the schools and courthouses, maintained the

roads, built the libraries and hired the peacekeepers. The municipality also collected the most taxes from the individual citizens. Thus, from 1850 to the 1920's, taxpayer actions were almost exclusively concerned with municipal fiscal affairs.

The reason that the state forum was chosen was that it was usually closer to the people than the federal courts that were then still riding the circuits. More importantly, state judges had no structural impediments under state law that prevented them from providing a remedy that often involved injunctive relief directed toward legally inferior public officials, the municipal officers. In fact, the first taxpayer action in federal court, *Crampton v. Zabriskie,* 101 U.S. 601, 25 L.Ed. 1070 (1879), a county taxpayer case, came to the federal forum only after the plaintiffs had gone to the state court and obtained a judgment which for some reason was unenforceable. *Id.* at 608, 25 L.Ed. at 1071 (The state court adjudged the proceedings invalid, and set the same aside. It does not appear that any attention was paid to this judgment). That was when the plaintiffs commenced an action in the federal circuit court. *Crampton v. Zabriskie* was, however, the exception that proved the rule as municipal taxpayer actions continued to flourish in state courts.

Government today is far different than it was in the 1850's. In the wake of the Great Depression and the New Deal legislation, the Second World War and later new social programs, the federal government has grown exponentially and both its

taxes and impact upon daily life has grown proportionally. State governments have grown along with the federal government often creating agencies and departments that mirror their federal counterpart so as to more easily participate in federally funded programs. The tax consequences of this growth in state government and the impact of state spending on the daily lives of the citizens have also grown exponentially. The same need for a mechanism to prevent fraud, waste and abuse in the disbursement of public funds that existed at the municipal level in the 1850's now exists at the state level. Unfortunately, as the *Nielsen* case clearly demonstrates, the state courts cannot provide the same level of protection for state taxpayers as they did for municipal taxpayers. The reason is the separation of powers provisions contained in virtually all state constitutions. As the *Nielsen* decision clearly demonstrates, where the violations are being carried out by *state* officials, the hands of the *state* courts are often tied.

In *Crampton v. Zabriskie*, supra, this Court justified the involvement of the federal court to protect taxpayer revenues in the following terms:

> Of the right of resident tax-payers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county or the illegal creation of a debt which they in common with other property-holders of the county may otherwise be compelled to pay, there is at this day no serious question. ... Certainly, in the absence of

> legislation restricting the right to interfere in such cases to public officers of the State or county, there would seem to be no substantial reason why a bill by or on behalf of individual tax-payers should not be entertained to prevent the misuse of corporate powers. The courts may be safely trusted to prevent the abuse of their process in such cases. (emphasis added) *Crampton v. Zabriskie*, supra, 101 U.S. at 609, 25 L.Ed at 1071 - 1072.

If this statement is still true, and the Taxpayers believe that it is, then where the abuse of process is committed by *state* officials, the doors of the federal courthouse must be open to the state taxpayers. If they are not then, as in this case, there is no court available to redress the state taxpayers' grievance. Unfortunately, as is discussed in the next section, the law surrounding the jurisdiction and standing of state taxpayer actions in federal court is, at best, unstable

2. There is a Need for this Court to Clarify its Earlier Decisions Concerning the Jurisdictional Rationale and Standing Requirements for State Taxpayer Actions in Federal Court

As Michael Mello accurately described the situation in his article, *Defunding Death*, 32 Am. Crim. Law Rev. 933, 1000 - 1001 (1995):

> The present status of state taxpayer standing is unsettled. This is because the

> Supreme Court has yet to address the issue satisfactorily, leaving the lower courts free to consider the issue without meaningful restraint. The courts' different understandings of the law yield conflicting conclusions. Some jurisdictions treat state taxpayers more leniently than federal taxpayers, while others treat them similarly and apply *Flast* or a *Flast*-like test to determine standing.

Although this Court considered the issue in *Doremus v. Board of Education*, 342 U.S. 429, 72 S.Ct. 394, 96 L.Ed. 475 (1952), and held that a state taxpayers could have standing if they brought a "good-faith pocketbook action," what was meant by "good-faith pocketbook action" has yet to be revealed. *Defunding Death*, supra, at 1001 n. 431.

Much of the confusion stems from the decision of this Court in *ASARCO Inc. v. Kadish*, 490 U.S. 605, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1988). The discussion in that case resulted in a 4 – 4 split between the Justices (Mrs. Justice O'Connor did not participate in the decision) on the issue of state taxpayer standing which has created more questions than answers as to what the standing requirements are. As a result, there are now conflicts between the circuits on almost every aspect of state taxpayer standing including issues as to who can be a plaintiff, how the action is to be plead, what is the jurisdictional rationale and what are the standing requirements. If state taxpayers are to continue to look to the federal courts for protection against the

abuse of corporate powers by state officials, these conflicts must be resolved.

In this case, the Taxpayers were the victims of the confusion in the circuits that has resulted from the *ASARCO* decision. The Second Circuit has issued only one formal opinion in a state taxpayer action. In *Board of Education v. N.Y. State Teachers*, 60 F.3d 106(2nd Cir. 1995), the court stated:

> State taxpayers, like federal taxpayers, do not have standing to challenge the actions of state government simply because they pay taxes to the state. In *Doremus v. Board of Educ. of Hawthorne*, 342 U.S. 429, 72 S.Ct. 394, 96 L.Ed. 475 (1952), the Supreme Court likened state taxpayers to federal taxpayers for the purposes of standing, and held that a state taxpayer's action only amounts to a case or controversy when it is a "good-faith pocketbook action," in which the taxpayer alleges injury to a "direct and particular financial interest." *Id.* at 434-35, 72 S.Ct. at 398; *See also ASARCO Inc. v. Kadish*, 490 U.S. 605, 613, 109 S.Ct. 2037, 2043, 104 L.Ed.2d 696 (1989) (Kennedy, J., joined by three justices) ("[W]e have likened state taxpayers to federal taxpayers, and thus we have refused to confer standing upon a state taxpayer absent a showing of 'direct injury...'"). We note, however, that the lower courts have employed differing interpretations of taxpayer standing. *Compare Colorado*

> *Taxpayers Union, Inc. v. Romer*, 963 F.2d 1394, 1402-03 (19th Cir. 1992) (requirements for federal and state taxpayer standing the same), *cert. denied*, U.S. , 113 S.Ct. 1360, 122 L.Ed.2d 739 (1993) and *Taub v. Kentucky*, 842F.2d 912, 918 (6th Cir.)(same), *cert. denied*, 488 U.S. 870, 109 S.Ct. 179, 102 L.Ed.2d 148 (1988) with *Hoohuli v. Ariyoshi*, 741 F.2d 1169, 1180 (9th Cir. 1984) (state taxpayer standing found where each plaintiff alleged "status as a taxpayer" and identified "amounts of money appropriated" for challenged actions). It seems to us that the "direct and particular" interest referred to in *Doremus* requires more than the mere payment of taxes alleged here. (emphasis added) *Id.*, at 110.

In dismissing the Taxpayers complaint, the district court was following the circuit court in holding that mere payment of taxes was not a sufficient "direct and particular" interest to confer standing even where the Taxpayers were claiming illegal disbursement of the tax funds that they had contributed. The district court clearly stated that the court lacked jurisdiction over claims based solely upon state law. Thus, the courts in the Second Circuit are applying a *Flast*-like test to state taxpayer actions.

The Taxpayers believe that the Second Circuit is misreading both the *Colorado Taxpayers' Union* and *Taub* decisions. In *Colorado Taxpayers' Union*, rather than extending *Flast* to state taxpayer actions as suggested by the Second Circuit, the court in

Colorado Taxpayers' Union clearly stated, "Both parties mistakenly rely on *Flast* to resolve whether appellants qualify for taxpayer standing in this case. *Flast* does not directly govern this appeal because it applies to federal taxpayer standing issues, not questions relating to standing for state taxpayers." 963 F.2d at 1399. Further, while *Taub* clearly limits non-economic taxpayer complaints to Establishment Clause cases, the circuit court let stand without comment its earlier decision in *Gwinn Area Community Schools v. Michigan*, 741 F.2d 840 (6th Cir. 1984), a state taxpayer case which involved real dollars and in which the court reached the merits of the controversy. Although the state taxpayers lost a summary judgment motion on the merits, the court exercised jurisdiction over their complaint which was based upon "[t]he equal protection and due process guarantees of the Constitution of the United States and the Michigan Constitution." *Id.*, at 842. Thus it is not clear, as the Second Circuit suggests, that the courts in the Sixth Circuit would not exercise jurisdiction over a state taxpayer complaint based upon true economic loss.

In *Colorado Taxpayers' Union* and *Taub*, the problem with the taxpayers' complaint was that they did not meet the "good-faith pocketbook" action requirement of *Doremus*. In *Colorado Taxpayers' Union*, the circuit court noted in its opinion:

> [The taxpayer plaintiffs] assert that Gov. Romer used numerous public resources to publicly oppose [a statewide tax reform]

> amendment. These resources allegedly included staff time, equipment and supplies, travel resources, and facilities at the state mansion and state capital office...[t]he plaintiffs have alleged that their campaign for [the amendment] would not have been so difficult (and, in fact, might have been successful) but for defendants acts." 963 F.2d at 1395-96.

The taxpayers were not complaining that state expenditures were increased, they were complaining that they had to spend more money to offset the impact of the governor's opposition. Similarly, in *Taub*, the circuit court noted in its opinion that:

> At oral argument on the motions in the district court, counsel for the plaintiff acknowledged that he could not show any actual economic injury in the form of past or probable future tax increases. 842 F.2d at 914.

The Taxpayers were well aware of the confusion among the circuits concerning the jurisdictional issues. From the outset, the Taxpayers were very concerned with precisely how to plead the action and searched the opinions of this Court and the circuit courts for direction. As the Second Circuit noted, in *Hoohuli v. Ariyoshi*, supra, the court approved the following allegations:

> Each of the individual plaintiffs have set forth his or her status as a taxpayer. The

challenge is to the "appropriating, transferring, and spending of taxpayers' money from the General Fund of the State Treasury". Plaintiffs complain that, "[b]y creating the class identified as 'Hawaiians' in the office of Hawaiian Affairs, in addition to the class of 'Native Hawaiians', the taxpayers have been burdened with the necessity to provide more taxes to support said second class." The pleadings set forth with specificity amounts of money appropriated and spent for allegedly unlawful purposes. This case fits the description of a "good faith pocketbook action" set forth in *Doremus*. 741 F.2d at 1180

The Taxpayers were also well aware that the Sixth Circuit in *Taub v. Commonwealth of Kentucky*, supra, specifically rejected the pleadings described in *Hoohuli* and the *Hoohuli* decision by name. *Taub v. Kentucky*, supra, 842 F.2d at 918 (We respectfully disagree with the court's conclusion in *Hoohuli v. Ariyoshi*). The Taxpayers therefore turned to other authorities. The Seventh Circuit, in a county taxpayer case, approved allegations in a complaint, "[W]hich charged that the defendants violated state law by failing to distribute collected tax revenues plus interest to the local public entities, thereby conspiring to deprive and actually depriving them of property without due process of law". (emphasis added) *Board of Education of Valley View v. Bosworth,* 713 F.2d 1316, 1317 (7th Cir. 1983). The Taxpayers therefore based their jurisdictional claim on the due process

clause. This jurisdictional claim has now been thoroughly rejected by the Second Circuit.

In *Board of Education v. N.Y. State Teachers*, supra, a heading in the opinion indicated that the Second Circuit might consider Federal Common Law as a jurisdictional basis for a state taxpayer action. This is not clear because Federal Common Law was not discussed in the text of the opinion. In Federation III, the Taxpayers included a jurisdictional plea based upon Federal Common Law. The Second Circuit has now rejected this jurisdictional claim as well. The Taxpayers believe that the Second Circuit is following its reading of the Sixth and Tenth Circuits and intends to limit state taxpayer cases to *Flast*-type cases. This is why it rejected the claim of jurisdiction under either the Federal Common Law or the Due Process Clause. Without a second federal nexus, state taxpayers will be denied access to the federal forum.

In *ASARCO*, did the Justices of this Court intend to extend the dual nexus requirement of *Flast* to state taxpayer cases? The Taxpayers believe that the answer is no. The failure of either Mr. Justice Kennedy or Mr. Chief Justice Rhenquist to cite *Flast* combined with Mr. Justice Kennedy's continued reliance upon *Doremus* indicates to the Taxpayers that *Doremus*, not *Flast*, remains the standard for state taxpayer actions. And with an allegation of $ 740 million in illegal disbursements, the Taxpayers believe that they meet the *Doremus* standard as described by Mr. Justice Kennedy. However, until this Court takes up a true "good-faith pocketbook"

state taxpayer action based upon a defined and substantial financial loss, the standing of state taxpayers in federal court will remain unsettled.

3. There is a Need for This Court to Determine for the First Time Whether the 11th Amendment to the Constitution of the United States Precludes Injunctive Relief Against State Officials in Actions Brought by State Taxpayers

In Federation I, II and III, the district court dismissed the Taxpayers' complaint in part based upon the 11th Amendment. The court held that by enjoining the State Officials from disbursing state taxpayer funds in violation of a *state* law limitation on their tax and spend authority, the court would be in effect ordering the State Officials to comply with state law and, under the holding of this Court in *Pennhurst*, that would violate the 11th Amendment. See *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984)

The 11th Amendment has been specifically discussed and decided in the context of a state taxpayer action in three federal decisions, namely, *Hoohuli v. Ariyoshi*, supra, 741 F.2d at 1173 – 1174, *Gwinn Area Comm. Schools v. Michigan*, supra, 741 F.2d at 844 n. 2 and *School Dist. of Phila. v. Pennsylvania Milk Marketing Board*, 877 F.Supp. 245, 251 (E.D. Pa. 1995). In each of these cases, the court rejected the state's assertion of the 11th

Amendment as a bar to the lawsuit and relief requested. Their holdings were based upon the exception to the 11th Amendment found in *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908) which controls where the relief sought is against a state official and is only prospective.

The Taxpayers believe that the instant action falls squarely within the *Ex Parte Young* exception. The defendants are all state officials charged by state law with enforcing the state spending legislation in question. The only relief requested is prospective injunctive relief. Moreover, this case does not seek to enforce compliance with state law *qua* state law. It was not the actions of the State Officials cited as defendants which was circumscribed by the state constitutional amendment in question. The conduct violating the spending cap was the increase in general budget expenditures authorized by the General Assembly. The State Officials merely enforce the budget adopted by the General Assembly. Further, they were cited as defendants in their capacity as Trustees of the public fisc. The purpose in naming these Trustees as defendants was to bring the funds or *res* within the jurisdiction of the court.

State taxpayer actions such as this are *quasi in rem* actions in that although the remedy operates upon persons, here the State Officials, the purpose of the remedy is really to preserve the taxpayers' money for use in connection with future lawful purposes. See, *Crampton v. Zabriskie*, supra, 101 U.S. at 609, 25 L.Ed. at 1071 (purpose of courts imposition of a

remedy is to prevent an illegal disposition of the moneys).

As of today, the 11th Amendment bars state taxpayer actions in the District of Connecticut that are based upon violations of *state* law limitations on the *state's* tax and spend authority and which seek prospective injunctive relief. The Taxpayers believe that this is based upon a misreading of this Court's decision in *Pennhurst*. This bar is in conflict with decisions directly on point in other circuits. This Honorable Court should resolve this conflict between the Connecticut district court and the other courts on this issue which is crucial to state taxpayer actions.

4. There is a Need for This Court to Decide for the First Time Whether *Pullman* Abstention is Appropriate Even After the State Supreme Court has Ruled that State Courts Lack Subject Matter Jurisdiction

Both the Magistrate Judge and the Second Circuit specifically found that in *Nielsen*, "[The state court] plaintiffs sought essentially the same relief as in the two [Taxpayer] federal actions." RR at A – 8; Summary Order at A - 20. The Supreme Court in *Nielsen* found that, "In this case, each of the alternate forms of relief that the plaintiffs seek ... raises separation of powers concerns that counsel strongly against justiciability." RR at A – 9 & 10. Thus, the Taxpayers' petition if filed in state court would be nonjusticiable and would have to be dismissed.

The Magistrate Judge was well aware that the State Supreme Court had already ruled that the Taxpayers claims would be nonjusticiable in state court. The RR clearly states that, "[t]he Second Circuit strongly suggested that *Pullman* abstention is appropriate, even after an adjudication by a state court." (emphasis added) RR at A - 12.

In Federation I and II, the Second Circuit found a "compelling argument" that the federal courts should abstain in favor of a state court determination of the state law issues citing the *Pullman* doctrine. But these decisions were before the decision in *Nielsen*. The Taxpayers filed Federation III *after* the State Supreme Court decided that the state law issues raised by the *Nielsen* plaintiffs and the Taxpayers were nonjusticiable.

In the *Pullman* decision, Mr. Justice Frankfurter noted that the discretion of the federal courts to abstain is not unbridled. "In the absence of any showing that (resort to the state forum) for securing a definitive ruling in the state courts cannot be pursued with full protection of the constitutional claim, the district court should (abstain)." *Railroad Comm'n v. Pullman Co.*, supra, 312 U.S. at 501, 61 S.Ct. at 645. Usually, when the federal court abstains, resort to the state forum serves to resolve the issues. In this case it did not and as at least one legal writer has stated, "*Pullman* reserved the litigants' right to return to federal court if the state court decision did not moot or resolve the question." Julie A. Davies, *Pullman* and *Burford* Abstention: Clarifying the

Roles of State and Federal Courts in Constitutional Cases, 20 U. C. Davis Law Review 1, 10 (1986). This is precisely what the Taxpayers have done in Federation III. In the wake of the *Nielsen* decision, there is no state forum to which the Taxpayers can present their grievance.

In *Pennzoil Company v. Texaco, Inc.*, 481 U.S. 1, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987), this Court compared *Pullman* abstention to *Younger* abstention. See *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) And although this Court has not considered the issue of justiciability under *Pullman*, it did consider it in connection with *Younger* abstention in *Moore v. Sims*, 442 U.S. 415, 99 S.Ct. 2371, 60 L.Ed.2d 994 (1979). In discussing *Younger* abstention, the Court noted that before abstaining, lower courts *must* examine the ability of the federal plaintiff to litigate its federal constitutional claims in a state proceeding. See *Kenneally v. Lungren*, 967 F.2d 329, 331-32 (9th Cir. 1992), *cert. denied*, 506 U.S. 1054 (1993). In connection with the ability to litigate the federal claims in state court, this Court in *Sims* stated:

> Under established principles of equity, the exercise of equitable powers is inappropriate if there is an adequate remedy at law. Restated in the abstention context, the federal court should not exert jurisdiction if the plaintiffs "had an *opportunity* to present their federal claims in the state proceedings. ... The question is whether that challenge can be

> raised in the pending state proceedings subject to the conventional limits on justiciablilty. (emphasis in original)(citations omitted) *Moore v. Sims*, supra, 442 U.S. at 425, 99 S.Ct. at 2378.

The final prong necessary for abstention under *Moore v. Sims*, supra, namely the availability of a state forum, is not present here. The district court specifically found that the Taxpayers in their federal actions and the plaintiffs in *Nielsen* both sought essentially the same relief. Both the state trial court and the State Supreme Court have now ruled that the issue of that relief is nonjusticiable. The Taxpayers cannot take this case to the state courts. Further, as the Court described the rationale for abstention under *Pullman* in *Pennzoil*:

> When federal courts interpret state statutes in a way that raises federal constitutional questions, "a constitutional determination is predicated on a reading of the statute that is not binding on state courts and may be discredited at any time – thus essentially rendering the federal-court decision advisory and the litigation underlying it meaningless. (citations omitted) *Pennzoil Company v. Texaco, Inc.*, supra, 481 U.S. at 11, 107 S.Ct. at 1526.

While this rationale may have been compelling in Federation I and II, in the wake of *Nielsen*, is it still compelling? Here we have a situation where

there can be no subsequent state decision discrediting the federal decision. The issues raised here are political questions and therefore nonjusticiable in state court. However, as this Court noted in *Baker v. Carr*, 369 U.S. 186, 236, 82 S.Ct. 691, 720, 7 L.Ed.2d 663 ((1962), "A state court's inability to grant relief does not bar a federal court's assuming jurisdiction." Nevertheless, the Second Circuit in affirming the district court ruling reasoned:

> Plaintiffs (Taxpayers) argue that because the Nielsen court affirmed the lower court's dismissal for lack of subject matter jurisdiction, its statements are of 'limited legal significance.' Even if it is true that dismissal for lack of subject matter jurisdiction on one claim precludes any res judicata effect, plaintiffs would then face a compelling argument for abstention under the Pullman doctrine. A – 20 & 21.

Both the district court and the circuit court properly rejected the State Officials' claim of issue preclusion based upon the *Nielsen* decision. This is a correct position under both federal law, *Spatt v. State of New York*, 361 F.Supp. 1048 (E.D.N.Y.)(three judge court), *affirmed*, 414 U.S. 1058, 94 S. Ct. 563, 38 L.Ed.2d 465 (1973) (A judgment rendered by a state court lacking competency is void and the federal plaintiff should be afforded a determination of his claim on the merits in federal court); *Cullen v. Margiotta*, 811 F.2d 698, 732 (2d Cir.), *cert. denied*, 483 U.S. 1021, 107 S.Ct. 3266, 97 L.Ed.2d 764

(1987)(A claim is not barred by *res judicata* if the court in which the first action was brought lacked subject matter jurisdiction to adjudicate that claim citing state law requirements), and state law, *Legassy v. Shulansky*, 28 Conn. App. 653, 658, 611 A.2d 930, 933 (1992) (Application of the doctrine of *res judicata* requires that there be a previous judgment on the merits. Judgments based upon want of jurisdiction are not rendered on the merits.) There is absolutely no doubt as to what the judgment of the court in *Nielsen* was, "The trial court, concluding that the claim presented by the plaintiffs is nonjusticiable, dismissed the plaintiffs' complaint *for lack of subject matter jurisdiction ... We affirm* the judgment of the trial court." (emphasis added) *Nielsen v. State*, 236 Conn. 1, 3, 670 A.2d 1288, 1289 - 90 (1996).

Is Ms. Davies correct in her interpretation of Mr. Justice Frankfurter in *Pullman*? If after the federal litigants exhaust the state forum and the issues are not resolved or rendered moot, can they return to the federal court for a resolution of the issues and relief? Does this Court's decision in *Moore v. Sims* require that the courts below specifically determine that the issues raised here are justiciable in the state forum before abstaining? The Second Circuit has decided that the answer to both questions is no. The Taxpayers believe that the Second Circuit is in error but this is a question that only this Court can resolve. The Taxpayers pray that this Court will issue the Writ and resolve this important issue.

4. This Matter is Not Moot and Consideration of this Petition Should Not be Prejudiced by The Denial of the Earlier Petition

Because it is not possible for the Taxpayers to obtain a review by this Honorable Court before the expiration of a biennial budget, this matter falls within the capable of repetition, yet evading review exception to the usual rules of Mootness. *Southern Pacific Terminal Co. v. I.C.C.*, 219 U.S. 498, 31 S.Ct. 279, 55 L.Ed. 310 (1911).

This case and this Petition are in an entirely different posture than they were in 1995 when the Taxpayers first asked this Court to review the decision of the Second Circuit in Federation II. That Petition, Docket No. 95 – 540, asked this Court to review that decision in light of the holding of this Court in *Deakins v. Monaghan*, 484 U.S. 193, 108 S.Ct. 523, 98 L.Ed.2d 529 (1988).

In *Deakins*, this Court had held that the federal courts lacked discretion to abstain where the only remedy that could make the federal plaintiffs whole, money damages, were not available in the state forum due to sovereign immunity. *Deakins* did not discuss the situation where the only relief that could protect the federal plaintiffs, namely injunctive relief, was similarly not available in the state forum.

In their petition for certiorari, the Taxpayers did not contend that the state courts had no

jurisdiction to resolve *any* of the state law issues. What they claimed was that in the state forum separation of powers precluded injunctive relief without which hundreds of millions (or $ 1.5 Billion to be precise) would be illegally disbursed. The Taxpayers asked this Court to review whether *Deakins* should be extended to cover situations in which injunctive relief was not available. When this Court denied the Taxpayers' petition, the *Nielsen* case was still in progress and, in fact, the Taxpayers later joined in that appeal. It was still possible that the state court would resolve all the state law issues and that some relief under state law would be available.

This petition presents a case that is in an entirely different procedural posture. The state court has stated that the issues raised here are nonjusticiable. The Taxpayers, believing that Mr. Justice Frankfurter intended for them to return to the federal forum if the state tribunal did not resolve the controversy, have done precisely that. Now it is for this Court to determine whether they will finally have their day in court.

CONCLUSION

For the reasons set forth herein, a Writ of Certiorari should issue to review the Opinion and Judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,
Robert A. Heghmann
Counsel for the Petitioners

APPENDIX

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UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Federation of Connecticut
Taxpayer Organizations, et al.,

3:96 CV 302(JBA)

v.

Dated: June 28, 1996

Christopher Burnham, et al.

Recommended Ruling on Pending Motions

On February 23, 1996, plaintiff Federation of Connecticut Taxpayer Organizations ["Federation"], an umbrella organization consisting of more than sixty local taxpayer associations, as well as the other plaintiffs, commenced this action, which concerns a constitutional amendment approved by the citizens of Connecticut on November 3, 1992, which became part of Connecticut Constitution, Article III, Sections 18(a), (b), and (c). The four defendants are state employees. (n.1) The file was referred to this Magistrate Judge on May 8, 1996. (Dkt. #25). See also Dkt. # 15 endorsement on Dkt. # 11, 5/15/96 endorsement on Dkt. #13).

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1. The defendants include: Christopher Burnham, State Treasurer; Nancy Wyman, State Comptroller; Reginald Jones, Secretary of the Office of Policy and Management; and Ralph J. Caruso, Director of the Office of Fiscal Analysis. (Complaint pars.11-14)

Three motions are presently pending before the Court: (1) defendants' renewed motion to dismiss, filed May 22, 1996 (Dkt. #30); (n.2) (2) plaintiffs' renewed motion for summary judgment and for a permanent injunction, filed May 13, 1996 (Dkt. #27); (n.3) and (3) plaintiffs' motion for preliminary injunction, filed June 18, 1996 (Dkt. #32). (n.4)

2. Defendants' original motion, filed April 18, 1996 (Dkt. #17), was denied without prejudice to renew. Attached to defendants' brief (Dkt. #18) were copies of rulings filed in the three related actions, discussed in Section II.A. On April 26, 1996, plaintiffs filed their brief in opposition to this motion (Dkt. #21) and an affidavit by plaintiffs counsel (Dkt. #22), with five attachments: copy of the legislative history behind this constitutional amendment (Exhs. 1-2), copies of newspaper articles about same (Exh. 3), and spending cap calculations for 1993-1995 (Exhs. 4-5). On May 9, 1996, defendants filed a reply brief. (Dkt. #26). With permission of the Court (see Dkt. #28), on May 20, 1996, plaintiffs filed a surreply brief. (Dkt. #29)
3. Plaintiffs' original motion, filed April 26, 1996 (Dkt. #20), was denied without prejudice to renew. Their brief and affidavit in support were also in opposition to defendant's motion. See note 1 supra. Counsel have agreed that this motion is limited to the issue of liability only and that the issue of damages, if any, is reserved to a later time. (See Dkt. #28). On May 30, 1996, defendants filed their brief in opposition (Dkt. #31), which incorporates by reference their previous arguments. See note 2 supra.
4. Plaintiffs also filed a brief and supplemental affidavit by counsel. (Dkt. ##33-34). On June 24, 1996, defendants filed their brief in opposition (Dkt. #35), which incorporated by reference their previous arguments. See note 2 supra. On June 25, 1996, plaintiffs filed their reply brief. (Dkt. #36).

For the reasons stated below, defendants' renewed motion to dismiss (Dkt. #30) is granted, plaintiffs' renewed motion for summary judgment and for a permanent injunction is denied, and plaintiffs' motion for preliminary injunction (Dkt. #32) is denied.

I. Factual and Procedural Background

On November 3, 1992, the Connecticut voters approved an amendment to the Connecticut Constitution which limited the extent to which the Connecticut General Assembly could increase the State's general budget expenditures, by creating spending caps and eventually a balanced budget. These amendments became Connecticut Constitution, Article III, Sections 18(a), (b), and (c).

On October 14, 1993, these same plaintiffs commenced Federation of Connecticut Taxpayer Organizations v. Suggs, 3:93 CV 2062(AHN), which alleged violations of these state constitutional provisions with regard to the 1992-93 and 1993-94 fiscal year budgets. As in this case, defendants filed a motion to dismiss and plaintiffs filed a motion for preliminary injunction. These motions were referred to this Magistrate Judge by U.S. District Court Judge Alan H. Nevas, to whom the file was assigned. On November 30, 1993, this Magistrate Judge filed a four-page "Recommended Ruling on Pending Dispositive Motions" ["Federation I"], which

dismissed plaintiffs' action, in that Sec. 1983 does not apply to claims made under the Connecticut Constitution. (n.5) This recommended ruling was approved by Judge Nevas, over plaintiffs' objection, on December 22, 1993.

Plaintiffs thereafter appealed this decision to the Second Circuit. On March 15, 1994, the Second Circuit issued a two-page decision ["Federation II"], which affirmed the district court in language which was critical of plaintiffs:

> As an initial matter, it is no up to the district court to divine plaintiffs' theory of liability. Plaintiffs admit on appeal that the allegations in their complaint were "clumsy" and "could have been more artfully drafted." Plaintiffs' failure to specify how defendants violate their federal rights properly subjected their Sec. 1983 complaint to dismissal.
>
> More importantly, plaintiffs' theory of liability is untenable. It relies on the proposition that state taxpayers have a property interest in Connecticut's tax funds because the funds constitute a trust which is held in their interest. However, the cases it cites for this proposition all relate to municipal taxpayers. Plaintiff does not address this distinction or

5. Copies of the relevant decisions are also attached to plaintiffs' motion for a status conference, filed February 23, 1996. (Dkt. #4)

offer any reason why fiduciary duties applicable to municipal authorities are also owed by state officials.

Finally, even under plaintiffs' theory of the case, there would be a compelling argument for abstention under the Pullman doctrine since the district court could not decide the federal constitutional claim unless it decided a substantial issue of state law, namely, whether the budgets passed by the Connecticut General Assembly violated Sec. 18 to Article III of the Connecticut Constitution. This is an unsettled issue that should be decided in the first instance by the state courts.

Federation II, at 1- 2

On April 25, 1994, plaintiffs refiled their action in federal court, which again was assigned to Judge Nevas. Federation of Connecticut Taxpayers Organization v. Suggs, 3:94 CV 673 (AHN). In this Magistrate Judge's absence for medical reasons, defendants' motion to dismiss was referred to Magistrate Judge Holly B. Fitzsimmons. On October 12, 1994, Magistrate Judge Fitzsimmons filed a three-page "Magistrate Judge's Ruling on Defendants' Motion to Dismiss" ["Federation III"], which dismissed the complaint on the basis of Pullman abstention and for the same reasons as set forth in Federation I and Federation II. Magistrate

Judge Fitzsimmons added that "Notwithstanding the clear message from both the District Court and the Court of Appeals that this controversy should be litigated in state court, the plaintiffs have refiled here," and thus concluded that "[t]he case should be dismissed with prejudice to its refiling in federal court." Federation III, at 2,3. This recommended ruling was approved by Judge Nevas on November 10, 1994 over plaintiffs' objection.

Plaintiffs again filed an appeal and the Second Circuit, on June 21, 1995, again affirmed the district court's decision in a four-page opinion ["Federation IV"]. The Second Circuit agreed with Magistrate Judge Fitzsimmons that Pullman abstention was appropriate:

> There are three conditions for Pullman abstention. First, the state law at issue must be unclear. Second, the resolution of the federal issue raised must turn on interpretation of state law. Third, a state court could interpret the pertinent state law in such a way as to avoid the federal issue.
>
> We find that all three of these conditions are present in the instant case. The supposed federal issue only exists if the Connecticut budget is truly unconstitutional, and a Connecticut state court could hold that the budget was valid under the Connecticut constitution, which would obviate any challenge under the federal constitution.

> Finally, the state law is unclear in the sense that the federal courts have little competence to adjudicate state issues so close to the core of the mechanism of state governance.

Federation IV, at 3 (multiple citations omitted).

On or about September 28, 1993, an action was commenced in the state Superior Court, Nielsen v. State of Connecticut, in which plaintiffs sought the same relief as in the two federal actions. Superior Court Judge Thomas Corradino dismissed the lawsuit as nonjusticiable; the plaintiffs here joined in the appeal as amicus curiae. (n.6) On February 6, 1996, the Connecticut Supreme Court, sitting en banc, affirmed the trial court. Nielsen v. State of Connecticut, 236 Conn. 1. As Chief Justice Ellen Peters held for the unanimous bench: (N.7)

> "Although it is widely assumed that the judiciary, as ultimate arbiter of the meaning of constitutional provisions, must determine every constitutional claim presented and provide appropriate relief, some constitutional commands fall outside the conditions and purposes that circumscribe judicial action." The plaintiffs have raised a claim that inextricably presents a political question not

6. See Dkt. #4, Exhs. 5-9.

7. See note 8 infra.

> amenable to judicial resolution and that seeks relief that a court cannot provide without an impermissible intrusion upon the prerogatives and functions of the coordinate branches of government. For both these reasons we conclude that the case is nonjusticiable.
>
> Central to our determination that the plaintiffs' claim presents a nonjusticiable political question is the "textually demonstrable constitutional commitment" of the definition of the spending cap terms to the General Assembly ... this provision, by its plain and unambiguous terms, commits exclusively to the General Assembly the power to define the spending cap terms and nowhere intimates any role in this process for the judiciary. Moreover, neither the structure nor the history of the provision manifests any intended constraint on the unconditional definitional authority conferred upon the General Assembly. Nothing elsewhere in our constitution contradicts this textual commitment to the General Assembly.

Id. at 8-9 (multiple citations omitted). Chief Justice Peters continued:

> In this case, each of the alternate forms of relief that the plaintiffs seek – mandating the General Assembly to define the spending cap terms by the necessary three-fifths vote in each

> house, enjoining state officials from spending funds in excess of the funds spent in fiscal year 1992-93 until the General Assembly defines the terms or defining the terms ourselves – raises separation of powers concerns that counsel strongly against justiciability.

Id. at 10-11. Chief Justice Peters advised plaintiffs as follows: "Our decision requires the plaintiffs to seek relief elsewhere. The voters who cast their ballots to adopt article third, Sec. 18, entrusted its implementation to their legislators. If the plaintiffs and other voters are dissatisfied with that implementation, their recourse is to the political process." Id. at 13. (n. 8)

---

8. Justice Berdon filed a concurring opinion, in which he disagreed with the majority's conclusion that the issue was nonjusticiable:

> We have a constitutional obligation to keep the doors of this court open in order to enforce our laws. The people of the state approved a constitutional amendment that would require both a balanced budget and a spending cap. We cannot excuse the legislature's default by merely labeling it a political question and thereby rendering the issue nonjusticiable. Nor is it appropriate for us to conclude that the only remedy available to the people is at the polling booth by "kicking the rascals out." Our democracy depends in part on the willingness of the courts to enforce uniformly our constitutional law.

Id. at 16. Justice Berdon, However, agreed with the majority's outcome because he believes that plaintiffs'

As previously mentioned, this action was filed seventeen days after the *Nielsen* decision was issued, and pertains to the budgets for fiscal years 1993-1994 through 1996-97. Plaintiffs allege violations of their due process rights under the Fifth and Fourteenth Amendments, and seek injunctive relief with respect to disbursement of state taxpayer revenues in excess of these Connecticut Constitutional provisions.

II. DISCUSSION

A. DEFENDANTS' MOTION TO DISMISS

Defendants have raised five arguments: (1) plaintiffs have failed to state a claim for relief; (2) the Eleventh Amendment bars this suit, which is based on claimed state law violations; (3) abstention is appropriate under the Pullman doctrine; (4) the named state defendants have no direct, personal involvement with the claimed violations of plaintiffs' rights; (n.9) and (5) the complaint is subject to dismissal under principles of res judicata.

In this action, plaintiffs continue to assert that state taxpayers have a property interest in Connecticut tax funds because these funds constitute a trust held in their interest. Cf. Complaint Par. 18

allegations were premature. In that "insufficient time has elapsed between the effective date of the balanced budget amendment and this date." Id.

9. See note 1 supra

("The named Defendants are the Trustees of the state tax revenues contributed by the Plaintiffs."). However, as the Second Circuit ruled in Federation II at 2, "plaintiffs' theory of liability is untenable." See also Federation III at 1-2.

Moreover, it is well-established that the Eleventh Amendment bars all suits against state officials in federal court, irrespective of the relief sought, if the claims are based upon alleged violations of state, not federal, law. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 121 (1984). As the United States Supreme Court observed, "[I]t is difficult to think of a greater intrusion of state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." Id. at 106. Chief justice Peters of the Connecticut Supreme Court expressed her reluctance for the Connecticut state judiciary to involve itself "inextricably" with the internal workings of the Connecticut General Assembly. Nelson, 236 Conn. at 8-11. That reluctance is far more heightened here, where plaintiffs have presented their claim before a federal court.

Even assuming arguendo that a federal constitutional issue is presented, in Federation IV (at 3), the Second Circuit strongly suggested that Pullman abstention is appropriate, even after an adjudication by a state court: "The supposed federal issue only exists if the Connecticut budget is truly

unconstitutional, and a Connecticut state court could hold that the budget was valid under the Connecticut constitution, which would obviate any challenge under the federal constitution."

In light of these conclusions, there is no need to address the two other arguments raised by defendants. Accordingly, defendants' motion to dismiss is granted.

B. PLAINTIFFS' RENEWED MOTION FOR SUMMARY JUDGMENT AND FOR A PERMANENT INJUNCTION AND PLAINTIFFS MOTION FOR PRELIMINARY INJUNCTION

In light of the conclusion reached in Section II.A supra, plaintiffs' renewed motion for summary judgment and for permanent injunction and plaintiffs' motion for preliminary injunction are denied.

III. CONCLUSION

Accordingly, for the reasons stated above, defendants' renewed motion to dismiss (Dkt. #30) is granted, plaintiffs' renewed motion for summary judgment and for a permanent injunction (Dkt. #27) is denied, and plaintiffs' motion for preliminary injunction (Dkt. #32) is denied.

See 28 U.S.C. Sec. 636(b)(written objections to ruling must be filed within ten days after service fo same); F. R. Civ. P. 6(a), 6(e) & 72; Rule 2 of the Local Rules for United States Magistrate Judges, United States District Court for the District of Connecticut; Small v. Secretary, H&HS, 892 F.2d 15, 16 (2d. Cir. 1989)(failure to file timely objection to Magistrate Judge's recommended ruling may preclude further appeal to Second Circuit.)

Dated at New Haven, Connecticut, this 28th day of June, 1996.

Joan Glazer Margolis
United States Magistrate Judge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Federaation of Connecticut
Taxpayer Organizations, et al.,

3:93 CV 302 JBA

v.

Christopher Burnham, et al

JUDGMENT

This cause came on for consideration of the defendants' renewed motion to dismiss, plaintiffs' renewed motion for summary judgment and for a permanent injunction and plaintiffs' motion for preliminary injunction, by the Honorable Joan Glazer Margolis, United States Magistrate Judge and the Honorable Janet Bond Arterton, United States District Judge, and

The Court having considered the motions and all the papers submitted in connection therewith, approved ands adopted the Magistrate Judge's ruling granting the defendants' renewed motion to dismiss; denying plaintiffs' renewed motion for summary judgment and for a permanent injunction; denying plaintiffs' motion for a preliminary injunction,

It is therefore **ORDERED** and **ADJUDGED** that judgment is entered for the defendants and the complaint is dismissed.

Dated at New Haven, Connecticut this 25th day of March, 1997.

Kevin F. Rowe, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse, Foley Square, in the City of New York, on the 17th day of November, one thousand nine hundred and ninety-seven.

Present:

Hon. Richard J. Cardamone,
Hon. John M. Walker, Jr.,
Hon. Pierre n. Leval.
Circuit Judges

Federation of Connecticut Taxpayer Organizations, et al.,

Plaintiffs-Appellants,

v.

ORDER
No. 97-7405

Christopher Burnham, et al.,

Defendants-Appellees

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the Untied States District Court for the District of Connecticut (Arterton, J.) and was argued.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of said district court be and it hereby is AFFIRMED.

Plaintiffs, eight taxpayer associations and two individuals, appeal from a judgment of the United States District Court for the District of Connecticut (Janet Bond Arterton, Judge) dismissing their complaint brought against four state officials under 42 U.S.C. Sec. 1983 alleging that disbursements authorized by defendants and the Connecticut

General Assembly violated a newly adopted amendment to the state constitution placing certain limitations on budget expenditures and use of surplus finds. The district court determined that plaintiffs had not presented a federal constitutional issue; their claims were, in any event, barred by the Eleventh Amendment; and that even if a federal constitutional issue were presented, Pullman abstention was appropriate.

This is the third such suit plaintiffs have brought in federal court. The first two suits were dismissed for lack of subject matter jurisdiction and under the Pullman abstention doctrine, respectively, and we affirmed each of these decisions. See Order, Docket No. 93-9360, March 15, 1994 (Federation II); Order, Docket No. 94-9208, June 21, 1995 (Federation IV).

Plaintiffs contend that their member taxpayers have a property interest in tax revenues they contribute; that the four defendant officials are trustees of these revenues; and that by making appropriations in accordance with the General Assembly's unconstitutional budgets, the defendants are depriving the taxpayers of their property interest without due process of law. Suit was brought against the four state officials who administer the tax revenues in order to prevent wrongful distribution of the funds. We have stated previously that plaintiffs'

theory of liability is untenable. See Federation II, at 2-3.

But we need not reach this issue because, in the interim, the Connecticut Supreme Court has spoken on the matter in Nielsen v. State of Connecticut, 670 A.2d 1288 (1996), the court addressed a claim for relief substantially similar to that sought here. The plaintiffs there also sought injunctive relief to compel the General Assembly to define key spending-cap terms in the amendment, as required by the amendment itself. The court held, inter alia, that it could not enjoin state officials from spending excess funds because there had been no constitutional violation. "[T]he adoption of article third, Sec. 18, establishes only a future right to a spending cap, a right that will mature into an actionable right only after its predicate terms have been defined by the General Assembly ... In the absence of defined terms, there is not basis for enjoining presently permissible conduct by a coordinate branch of government." Id. at 1293-94 (citations omitted). We find this pronouncement is sufficient to dispose of the instant case. Since the alleged violation of the state's constitution was the source of the plaintiffs' claimed due process deprivation, plaintiffs have not stated a claim upon which relief may be granted.

Plaintiffs argue that because the Nielsen court affirmed the lower court's dismissal for lack of

subject matter jurisdiction, See Nielsen, 670 A.2d at 1292, its statements are of "limited legal significance." Even if it is true that dismissal for lack of subject matter jurisdiction on one claim precludes any res judicata effect, plaintiffs would then face a compelling argument for abstention under the Pullman doctrine. Three conditions must be met for Pullman abstention to apply: (1) the state law at issue is unclear; (2) interpretation of state law is necessary to resolve the federal issue raised; and (3) a state court could resolve the state law issue in such a way as to avoid the federal issue. See Greater New York Metro. Food Council v. McGuire, 6 F.3d 75, 77 (2d Cir. 1993). Under plaintiffs' view of Nielsen, all conditions would be satisfied here. First, it would be unclear whether the state constitutional amendment had become operative, thereby creating an enforceable state right. Second, a federal district court could not decide the federal constitutional claim unless it decided substantial issues of state law, namely, whether the amendment was in fact self-executing and therefore operative despite the absence of defined terms. Third, the Nielsen opinion is evidence that the state courts have addressed the issue in such a way that the federal questions plaintiffs raise are avoided.

In light of our conclusion, it is unnecessary for us to reach the other issues raised by defendants, including: whether assuming the amendment were operative, plaintiffs have stated a federal cause of

action; whether plaintiffs have standing to sue; and whether this suit would be barred by the Eleventh Amendment. We agree with the Connecticut Supreme Court's observation that plaintiffs' proper recourse is to the political process. See Nielsen, 670 A.2d at 1294.

The judgment for the district court is affirmed.

FOR THE COURT

GEORGE LANGE III, Clerk

UNITED STATES COURT OF APPEALS
for the Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 28th day of January one thousand nine hundred and ninety-eight.

Present:

Hon. Richard J. Cardamone,
Hon. John M. Walker,
Hon. Pierre N. Leval,
Circuit Judges.

Federation of CT

v. Docket no. 97-7405

Burnham

A petition for rehearing having been filed herein by Appellants Federation of Connecticut Taxpayer Organizations, et al.,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

FOR THE COURT
George Lange III, Clerk

CONNECTICUT CONSTITUTION

ARTICLE III, SECTION 18

Article third of the constitution is amended by adding section 18 as follows:

Sec. 18 (a) The amount of general budget expenditures authorized for any fiscal year shall not exceed the estimated amount of revenue for such fiscal year.

(b) The general assembly shall not authorize an increase in general budget expenditures for any fiscal year above the amount of general budget expenditures authorized for the previous fiscal year by a percentage which exceeds the greater of the percentage increase in personal income or the percentage increase in inflation, unless the governor declares an emergency or the existence of extraordinary circumstances and at least three-fifths of the members of each house of the general assembly vote to exceed such limit for the purposes of such emergency or extraordinary circumstances. The general assembly shall by law define "increase in personal income", "increase inflation" and "general budget expenditures" for the purposes of this section and may amend such definitions, from time to time, provided general budget expenditures expenditures for the payment of bonds, notes or other evidences of indebtedness. The enactment or amendment of such

definitions shall require the vote of three-fifths or the members of each house of the general assembly.

(c) Any unappropriated surplus shall be used to fund a budget reserve fund or for the reduction of bonded indebtedness; or for any other purpose authorized by at least three-fifths of the members of each house of the general assembly.

THE CONSTITUTION OF THE UNITED STATES

ARTICLE III, SECTION 2:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; - to all Cases affecting Ambassadors, and other public Ministers and Consuls; - to all Cases of admiralty and maritime Jurisdiction; - to Controversies to which the United States shall be a Party; - to Controversies between two or more States; - between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

THE ELEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Supreme Court, U.S.
FILED
MAY 22 1998
CLERK

No. 97-1761 (2)

In The
Supreme Court Of The United States
October Term, 1997

FEDERATION OF CONNECTICUT TAXPAYER ORGANIZATIONS ET AL.,

Petitioners

v.

CHRISTOPHER BURNHAM ET AL.,

Respondents

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

FEDERATION OF CONNECTICUT TAXPAYER ORGANIZATIONS, ET AL.,

Petitioners

v.

CHRISTOPHER BURNHAM, ET AL.

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

COUNTERSTATEMENT OF THE CASE

In this action the petitioners, the Federation of Connecticut Taxpayer Organizations (the "Federation"), have for a third time asked the federal courts to issue injunctive relief against Connecticut state officials for the same alleged violations of Connecticut's constitution. Each time the federal district and appellate courts have declined. This Court too should decline.

In 1991, both houses of Connecticut's General Assembly passed House Joint Resolution 205, which, among other things, proposed to amend Article III of Connecticut's constitution to add a new section 18. Subsection (b) of § 18 provided for a constitutional "spending cap":

> (b) The general assembly shall not authorize an increase in ***general budget expenditures*** for any fiscal year above the amount of ***general budget expenditures*** authorized for the previous fiscal year by a percentage which exceeds the greater of the percentage ***increase in personal income*** or the percentage ***increase in inflation***, unless the governor declares an emergency or the existence of extraordinary circumstances and at least three-fifths of the members of each house of the general assembly vote to exceed such limit for the purposes of such emergency or extraordinary circumstances. ***The general assembly shall by law define "increase in personal income", "increase in inflation" and "general budget expenditures" for the purposes of this section*** and may amend such definitions, from time to time, provided general budget expenditures shall not include expenditures for the payment of bonds, notes or other evidences of indebtedness. ***The***

> ***enactment or amendment of such definitions shall require the vote of three-fifths of the members of each house of the general assembly***. (emphasis supplied)

In 1992, the electorate ratified the constitutional amendment, which became Amendment XXVIII of the state constitution.

In 1993, the Federation filed suit in District Court ("*Federation I*") alleging that the General Assembly's passage of the 1992 budget act violated this constitutional cap. The District Court, *Nevas, J.*, denied the Federation's request for injunctive relief and dismissed the action, approving the recommended ruling of Magistrate Judge Joan Glazer Margolis. The District Court held that the Federation could not assert a federal claim under 42 U.S.C. § 1983 premised "solely" upon alleged violations of the Connecticut constitution. The Second Circuit Court of Appeals affirmed on the ground that the Federation had stated no federal cause of action and that *Pullman* abstention was appropriate under the circumstances.

Immediately thereafter, the Federation refiled suit (*"Federation II"*), purporting to amend its complaint, but making identical claims about the defendants' alleged violations of the constitutional cap. The District Court, *Nevas, J.*, dismissed that action too, approving the recommended ruling of Magistrate Judge Holly Fitzsimmons, who had observed:

> In an effort to circumvent the difficulties pointed out by the Court of Appeals [in *Federation I*], plaintiffs have recaptioned each count of the complaint as a 'Violation of the Due Process Clause of the Fifth and Fourteenth Amendment,' and alleged that their retained equity ownership in state tax revenues

> is a property right protected by the United States Constitution.

The Magistrate Judge then declared:

> This is not a federal claim upon which federal relief can or should be granted. These are issues which, under principles of federalism, the state courts should address first. For the reason set out in the November 30, 1993, opinion of Magistrate Judge Margolis, which was ratified by District Judge Nevas, and for the reasons stated in the Second Circuit's panel opinion, this case was dismissed once and should be dismissed again.

The Federation again appealed to the Second Circuit Court of Appeals, which again affirmed, holding that the federal courts should abstain. 60 F.3d 811 (2d Cir. 1995). This Court denied the Federation's petition for a writ of certiorari on November 13, 1995. 133 L.Ed.2d 406 (1995).

Meanwhile, an action styled *Nielsen v. State* had been brought in Connecticut Superior Court challenging the General Assembly's failure to implement the spending cap amendment, Art. III, § 18(b). The Federation appeared as amicus curiae in that case and filed a brief in support of the plaintiffs. On February 6, 1996, the Connecticut Supreme Court affirmed the Superior Court's dismissal of that case, holding that Art. III, § 18(b) was nonself-executing, had not been executed and the question presented was nonjusticiable. *Nielsen v. State*, 236 Conn. 1 (1996).

Undaunted, the Federation began this *third* federal action (*"Federation III"*) shortly after the *Nielsen* decision. The Federation has made the identical claims it has made in its prior suits. In the first count, the Federation claimed that "Art. III § 18(b) of the Connecticut Constitution is self-

executing and became fully effective on November 25, 1993 upon certification by the Secretary of [the] State." (Complaint, JA #2, ¶ 25) It then claims that the spending cap has been violated for the fiscal year 1995-96. (*Id.*, ¶ 26) Finally it alleged that the Federation "retains a legal interest protected by the Due Process Clause" in state tax revenues, and that since the defendants are allegedly spending state money illegally, the Court should enjoin them. (*Id.*, ¶¶ 27-28) The second count makes identical allegations for the fiscal year 1996-97.

Magistrate Judge Margolis once again recommended dismissal of the case on both Eleventh Amendment and abstention grounds. The District Court, *Arterton, J.*, agreed and dismissed the case. For a third time the Federation appealed to the Second Circuit Court of Appeals, which again affirmed. The petitioners again seek a writ of certiorari.

REASONS FOR DENYING THE WRIT

I. The Connecticut Supreme Court Has Held That Connecticut's Constitutional Spending Cap, Art. III, §18(b), Is Not Presently Effective, And So The Petitioners' Action Fails.

The Federation's entire argument proceeds from a faulty premise: that Connecticut's constitutional spending cap, Conn. Const. Art. III, § 18(b), is "self-executing and became fully effective on November 25, 1993 upon certification by the Secretary of [the] State." (JA #2, ¶ 25) Connecticut's highest court has held in *Nielsen* that, contrary to the premise of the Federation's case, the constitutional spending cap is not presently "operative," but establishes only a "future right to a spending cap" that has not yet matured. The three terms contained in the amendment to the State Constitution have "no inherent meanings." Rather, defining them requires the "exercise of political judgment."

Unless and until the legislature exercises this political judgment, the spending cap amendment provides no present right to the citizens of the state. As the final arbiter of interpretations of the state constitution, this decision of the Connecticut Supreme Court is thus binding on the federal courts.[1/]

From the holding of *Nielsen* follow two conclusions that doom the Federation's claim.

First, as the Court of Appeals properly held: "[s]ince the alleged violation of the State's constitution was the source of the plaintiffs' claimed due process deprivation, plaintiffs have not stated a claim upon which relief may be granted." Second, as the Court of Appeals alternatively held, *Nielsen* makes for a compelling argument for *Pullman* abstention. A federal court could not decide the federal constitutional claim unless it decided the purportedly unclear State law issue (the spending cap terms), and the State courts can decide, and in fact have decided, the State law issue in a way that avoids the federal issues.

Thus, notwithstanding the Federation's attempts to inflate the importance of this case, this matter does not in fact implicate intricate or unsettled questions of taxpayer standing or standards for such actions, and fails to implicate any federal interests that should be decided by this Court.

1/ The Federation is somehow of the opinion the Connecticut Supreme Court's statements in *Nielsen* are "dictum." This is clearly not so. Even if it were, however, in deciding questions of state law, federal courts must strive to predict how the highest court in the state forum would resolve the purportedly uncertain state law question. *In re Joint E. & S. District Asbestos Litigation*, 78 F.3d 764, 776 (2d Cir. 1993). *Nielsen* serves as a pretty good indicator.

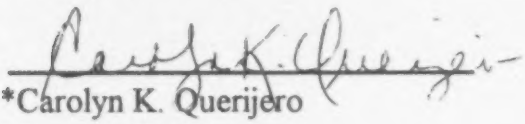
CONCLUSION

For all of these reasons, this Court should deny the writ.

Respectfully submitted,

RESPONDENTS

RICHARD BLUMENTHAL
ATTORNEY GENERAL



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No. 97 - 1761

In The

SUPREME COURT

of the

UNITED STATES
October Term, 1997

FEDERATION OF CONNECTICUT TAXPAYER ORGANIZATIONS, ET AL.,

Petitioners

versus

CHRISTOPHER BURNHAM, ET AL.,

Respondents

PETITIONERS' REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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PETITIONERS' REPLY TO RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PETITIONERS REPLY TO RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Federation of Connecticut Taxpayer Organizations, et al., (hereinafter the Taxpayers), respectfully file this Reply solely to correct two misstatements of the proceedings below contained in the Respondents' Opposition to Petition for Writ of Certiorari.

The first misstatement occurs at page 4 of the Respondents Opposition where the Respondents state, "On February 6, 1996, the Connecticut Supreme Court affirmed the Superior Court's dismissal of that case, holding that Art. III, Sec. 18(b) was nonself-executing, had not been executed and the question presented was nonjusticiable". The precise ruling of the Connecticut Supreme Court which appears at the end of the first paragraph of the opinion is stated by that court as follows, "The trial court, concluding that the claim presented by the plaintiffs is nonjusticiable, dismissed the plaintiffs' complaint for lack of subject matter jurisdiction ... We affirm the judgment of the trial court." *Nielsen v. State,* 236 Conn. 1, 3; 670 A.2d 1288, 1289-1290 (1996). Contrary to the representation of the Respondents, the words self-executing and/or nonself-executing do not appear anywhere in the

opinion – not in the text and not in the footnotes – although that issue was clearly before the court. The issue was nonjusticiable and the Connecticut Supreme Court did not discuss it.

The second misstatement occurs in footnote 1 at page 6 where the Respondents represent that, "The Federation is somehow of the opinion the Connecticut Supreme Court's statement in *Nielsen* are "dictum"." That is not the Taxpayers' opinion. The Taxpayers maintain that the *Nielsen* decision is void on any issue except the court's lack of subject matter jurisdiction. The Taxpayers' position is based upon the holding of the Second Circuit, which was affirmed by this Court, in *Spatt v. State of New York*, 361 F. Supp. 1048 (E.D.N.Y.)(three judge court), *affirmed*, 414 U.S. 1058, 94 S.Ct. 563, 38 L.Ed.2d 465 (1973).

CONCLUSION

This Honorable Court should grant the Writ of Certiorari and resolve the issues raised therein which are of imperative public importance.

Respectfully submitted,

Robert Alan Leghmann
Counsel for the Petitioners